RECORD AND BRIEFS

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No. 16-341

IN THE

Supreme Court of the United States

TC HEARTLAND, LLC,
D/B/A HEARTLAND FOOD PRODUCTS GROUP,
Petitioner,

v.

KRAFT FOODS GROUP BRANDS LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

AMICUS CURIAE BRIEF OF THE ORANGE COUNTY INTELLECTUAL PROPERTY LAW ASSOCIATION IN SUPPORT OF THE PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the Orange County Intellectual Property Law Association ("OCIPLA"), is a non-profit organization founded in 1983 to serve the community of intellectual property law practitioners in and around Orange County, California. OCIPLA's diverse membership includes local, non-local and out-of-state intellectual property law practitioners. OCIPLA is open to all persons having an interest in intellectual property law, including attorneys, patent agents, inventors, investors, legal assistants, paralegals, educators, students and other persons. OCIPLA currently has 374 members from some 75 different firms, businesses and other institutions. One of the main functions of OCIPLA is to provide a sustained schedule of high-quality continuing legal education and professional development programs related to intellectual property practice for its members and non-members. As such, OCIPLA and its membership are familiar with the practical and legal concerns that are important to counsel and litigants in patent litigation.

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[1] This brief is filed with the consent of the parties. Counsel for Petitioner and counsel for Respondent consented to the filing of this brief via electronic mail sent to counsel for amicus curiae. No party, and no party's counsel, authored this brief in whole or in part. No person, other than amicus curiae and its counsel, paid for or made monetary contributions to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The proper interpretation of 28 U.S.C. section 1391 requires that it be considered in the context of the chapter of the United States Code pertaining to venue, including the patent venue provision in 28 U.S.C. section 1400(b). The Federal Circuit, in *VE Holding*, appears to have misconstrued the phrase "for purposes of venue under this chapter" in the 1988 amendment to Section 1391 by interpreting that phrase in isolation, without regard to the context of the statute, and against established Supreme Court authority recognizing the relationship between the general venue rule and the special rule for patent cases. This Court should reinstate the interpretation of Section 1391 articulated in *Fourco*.

This Brief discusses two important consequences that have resulted from the Federal Circuit's interpretation of Section 1391. First, it rendered the patent venue provision, Section 1400(b), logically inconsistent and practically meaningless—it might as well no longer exist. Second, a pattern has evolved in practice under the resulting permissive venue rules, whereby a disproportionate number of patent cases are filed in select districts that are attractive to patent plaintiffs—districts that in many instances would not have been available under a proper interpretation of the venue statutes.

The first consequence—the impact of the Federal Circuit's interpretation on the statute itself—demonstrates that the interpretation is incorrect and constitutes a proper basis for this

Court to overrule *VE Holding*. The second consequence—how lower courts and litigants have reacted to and implemented the Federal Circuit's venue ruling—reflects that that the ruling is unsound in light of the 2011 amendment to Section 1391. Case filing data from recent years demonstrates these practical consequences and offers some examples. While it is true that the words of the statute, taken in context, should control above all else, the real-world effects stemming from the second consequence provide important practical context for the statute's current operation. They also illustrate that the traditional purpose and structure of the patent venue statute, as recognized by previous rulings of this Court, has been largely ignored.

ARGUMENT

I. Properly Construed, 28 U.S.C. § 1400(b) is the Sole and Exclusive Provision Governing Venue in Patent Infringement Actions and Should Not be Supplemented by 28 U.S.C. § 1391 (c).

The Federal Circuit's interpretation of Section 1391(c), and its decision that Congress's minor change to Section 1391(c) incorporates it into Section 1400(b), are incorrect under basic canons of statutory construction.

In 1897, Congress adopted a patent venue statute—the predecessor of 28 U.S.C. section 1400(b). *See* Act of March 3, 1897, 29 Stat. 695 (which became Section 48 of the 1911 Judicial Code, 28 U.S.C. (1940 ed.) § 109). According to that statute, venue for patent infringement actions

existed "in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business." *Id.* In 1942, the Court confirmed that "Congress did not intend the Act of 1897 to dovetail with the general provisions relating to the venue of civil suits, but rather that it alone should control venue in patent infringement proceedings." *Stonite Prods. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942).

In 1948, Congress enacted 28 U.S.C. section 1400(b), specifying that "patent venue is proper in *the* judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1948) (emphasis added). Then, in 1957, relying on *Stonite*, the Supreme Court again confirmed that 28 U.S.C. section 1400(b) "is the sole and exclusive provision controlling venue in patent infringement actions [. . . and] it is not to be supplemented by the provisions of 28 U.S.C. section 1391(c)." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 229 (1957). Congress has not amended Section 1400(b) since.

In 1988, Congress amended Section 1391. As amended, the section reads, in pertinent part, as follows:

> (c) *for purposes of venue under this chapter*, a defendant that is a corporation shall be deemed to reside in any judicial

> district in which it is subject to personal jurisdiction at the time the action is commenced . . . .

28 U.S.C. § 1391(c) (1988) (Judicial Improvements and Access to Justice Act, Pub. L. No. 100 702, 102 Stat. 4642 (1988) (codified at various sections of 28 U.S.C.) ("1988 Act") (emphasis added). In 1990, the Federal Circuit held that the 1988 amendment to Section 1391 meant Section 1391(c) "is to supplement section 1400(b)." *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574, 1580 (Fed. Cir. 1990). The Federal Circuit also concluded that the 1988 amendment effectively overruled *Fourco. Id.*

In 2011, Section 1391(c) was amended again. The 2011 amendment eliminated from Section 1391(c) the phrase "*for purposes of venue under this chapter.*"

* * * *

It is well established that interpretation of statutes begins with the language of the statute. Courts should be guided not by "a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). In this case, both the statutory language in its proper context and the well-recognized purpose of the statute indicate that venue under Sections 1391(c) and 1400(b) are independent principles.

This Court already examined the structure and purpose of Section 1391(c) in *Stonite*. The Court further recognized, in *Brunette Mach. Works, Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706 (1972), that "Congress placed patent infringement cases in a class by themselves, outside the scope of general venue legislation." 406 U.S. at 713. Thus, *Stonite* and *Brunette* leave no doubt that Section 1391 is the general venue statute, while Section 1400(b) is a specific carve-out for patent cases.

In *VE Holding*, the Federal Circuit's opinion discussed many approaches to statutory interpretation, but ultimately its holding disregarded the clear purpose and structure of the venue statute outlined by this Court.[2] It runs afoul of the settled principle that, when Congress intends to change a regulatory scheme, it says as much. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (internal citations omitted). Moreover, in 2011 Congress eliminated any "mouseholes" by removing the language of Section 1391 on which *VE Holding* relied.

The Federal Circuit held that the inclusion of the language "for purposes of venue under this

[2] A fundamental principle of interpreting any legal instrument, including statutes, is that the words of the text "and what they convey in their context" are of paramount concern. Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts 56 (2012).

chapter" in the 1988 amendment of Section 1391(c) incorporated that definition within Section 1400(b)'s grant of venue "in the judicial district where the defendant resides." *VE Holding*, 917 F.2d at 1575. In doing so, the Federal Circuit did not acknowledge that even the version of Section 1391(c) in 1957 already included the phrase "for venue purposes." The minor textual change in the 1988 amendment simply does not support a wholesale rejection of 90 years of statutory and judicial precedent establishing that the sections operate independent of one other.

Moreover, the Federal Circuit's interpretation of Section 1391(c) would render Section 1400(b) virtually redundant. In its analysis, the Federal Circuit left unanswered an important question: If Congress intended to change the patent venue statute, then why, after repeated amendments to Section 1391(c), does Section 1400(b) recite that "patent venue is proper in the judicial district where the defendant resides, *or* where the defendant has committed acts of infringement *and* has a regular and established place of business"? 28 U.S.C. § 1400(b) (emphasis added). If "resides" means having an "established place of business," then there would be no reason for the conjunction "or" between the two phrases. The word "resides" in its statutory context must mean something other than "having an established place of business."

II. The Federal Circuit's Construction of 28 U.S.C. § 1400(b) Has Led to a Concentration of Cases In Patentee-Preferred Venues.

As the venue statutes are currently applied by the Federal Circuit, the number of new patent cases filed in certain districts throughout the country has drastically outpaced other districts, resulting in notable disproportionality between districts.[3] Chart 1, below, shows the number of new patent cases filed in the eight busiest patent venues in recent years. Although this consequence should not influence the Court's interpretation of the patent venue statute itself, these real-world effects provide background for how the venue statute operates in practice under the Federal Circuit's interpretation of the statue.

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[3] It does not necessarily follow that there is anything improper in lawyers or litigants choosing, consistent with current Federal Circuit precedent, to file patent infringement cases in the most advantageous venue.

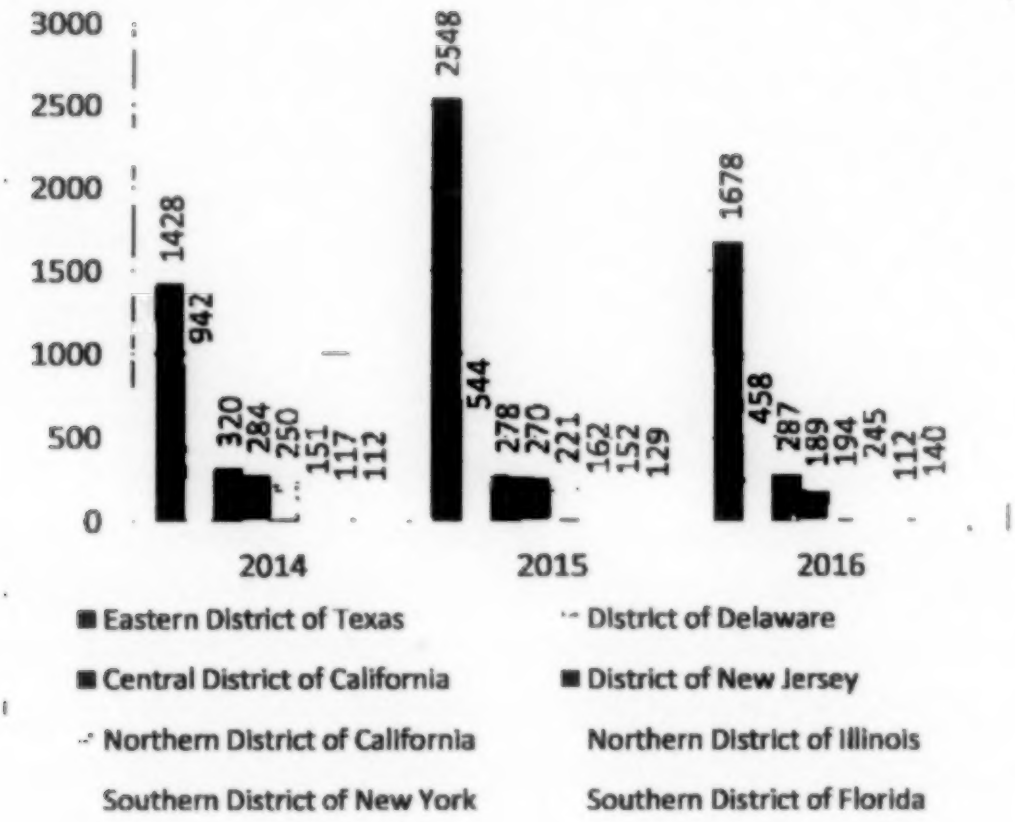

Chart 1. Top Eight Districts by Number of Patent Case Filings.

The impact of this disparity in total patent case filings comes into further focus when analyzed against the number of authorized judgeships per district. Congress authorizes a set number of permanent and temporary judgeships in each judicial district. *See* 18 U.S.C. § 133. For instance, three judges are allotted for each of the Districts of Alaska and Wyoming, whereas the Central District of California is allotted 27 judges, and the Southern District of New York, 28. *Id.* In periodic revisions to Section 133, Congress has adjusted the allotment of judgeships over time in response to changes in population, caseloads and other factors. While it is

not an ideal measure of the expected distribution of patent cases, the number of authorized judgeships per district is, broadly speaking, an objective reflection of the legislature's allocation of judicial resources across the district courts. Thus, it serves as a useful benchmark against which to compare patent case filings.

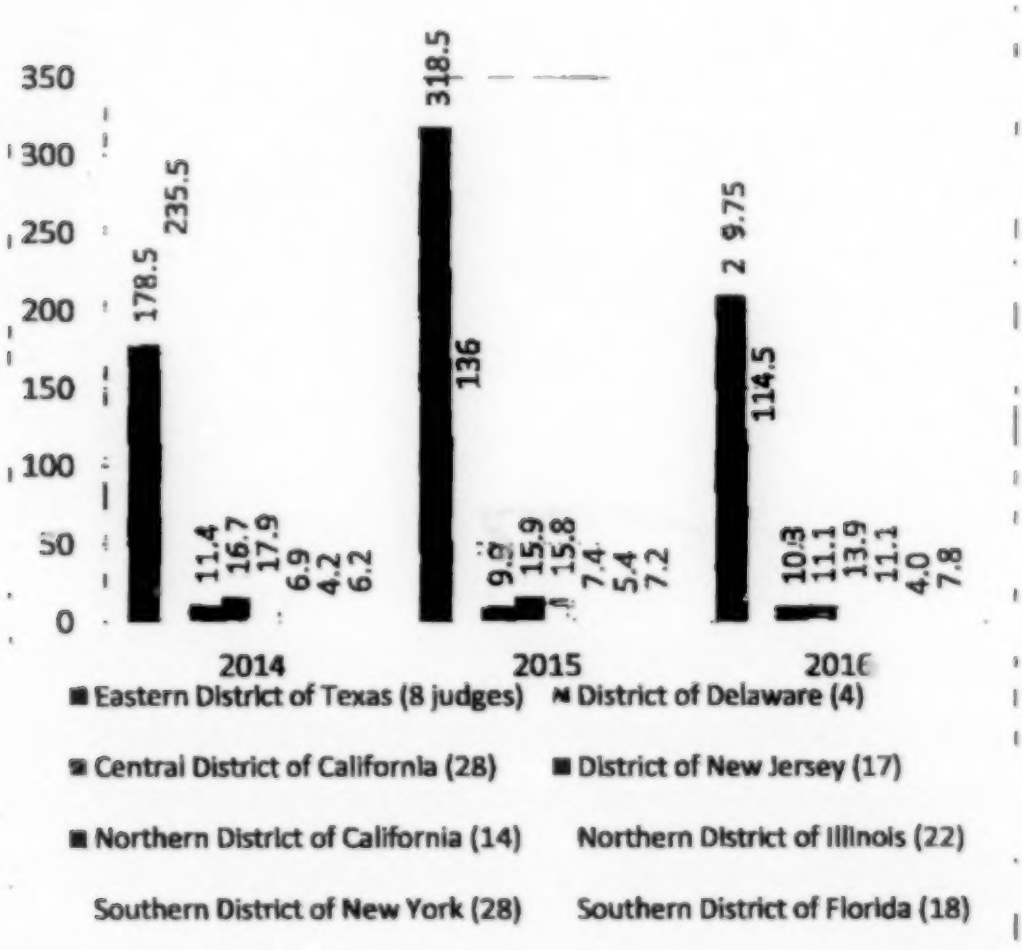

Chart 2. Ratio of New Patent Cases per Judge.

Chart 2 shows the number of new patent cases filed per authorized judge in the eight districts with

the most patent filings in recent years.[4] Even among the eight districts boasting the most patent cases, the District of Delaware and the Eastern District of Texas have over ten times more patent cases filed per judgeship than any other district.

For example, the Eastern District of Texas has seen an average of 2272% more patent cases filed per judge than the district with the third most cases, the Central District of California, over the last 3 years (1562%, 3208%, and 2046% from 2014 to 2016 respectively). As another data point, the Eastern District of Texas has had an average of 2936% more cases per judge than the seventh busiest patent district, the Northern District of Illinois, over the last 3 years (2601%, 4325%, and 1883% respectively).

According to Docket Navigator's Year in Review 2015, 74.6% of all new patent cases filed that year were filed in these eight districts.[5] DocketNavigator Analytics, *2015 Year In Review* 19 (2016), *available at* http://home.docketnavigator.com/year-review/. Thus, the current application of patent venue rules

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[4] These figures include both permanent judgeships and temporary judgeships, as the temporary judgeships in the Eastern District of Texas, Central District of California, and Southern District of Florida have been extended through the past three years. See "Chronological History of Authorized Judgeships - District Courts", available at <http://www.uscourts.gov/>, last accessed January 27, 2017.

[5] For the remaining districts that are not shown in Charts 1 and 2 above, the total number of patent cases is just a fraction of the high-volume districts.

has concentrated patent cases in plaintiff-favored districts at a rate drastically out of proportion with the Congressional allocation of judicial resources.

III. The Disproportionate Concentration of Patent Cases in Certain Districts Results in High-Volume Courts Exercising *De Facto* Policy Making Authority.

The Federal Circuit's current interpretation of patent venue rules has resulted in a high concentration of patent cases in a small number of courts. Consequently, just a few courts control the vast majority of patent cases nationwide. One result of that development is that local norms and practices, especially those in venues that are attractive to patent plaintiffs, can become *de facto* patent policy.

For good reason, many of the decisions that impact the parties in patent cases are left to the discretion of the individual district judge or the application of local rules. *See PPG Indus., Inc. v. Celanese Polymer Specialties Co.*, 840 F.2d 1565, 1571–72 (Fed. Cir. 1988) (quoting Judge Friendly in *Indiscretion about Discretion*, 31 Emory L.J. 747, 763 (1982)). Although local rules are important tools for setting a court's rules of practice and procedures, the trial court's rulings on case management, discovery, admission of evidence, and injunctions, among others, are rarely reversed because they are subject to the lenient abuse of discretion standard. *See Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 265 (5th Cir. 2007); *see generally* Kevin Casey et. al., *Standards of*

Appellate Review in the Federal Circuit: Substance and Semantics, 11 FED. CIR. Bar J. 279 (2002). Thus, for many of the procedural, evidentiary, and case management issues, there is little meaningful opportunity for appellate review.

Motions to transfer venue provide a telling example of local policies and norms that differ from court to court, and for which a party has virtually no right to review. TC Heartland's experience in the trial court illustrates this dynamic. The denial of TC Heartland's motion to transfer could be corrected only by a writ of mandamus, which required the petitioner to show an abuse of discretion and that the right to relief is "clear and indisputable." *Cheney v. U.S. Dist. Court for the Dist. of Columbia*, 542 U.S. 367, 380-81 (2004). With such a forgiving standard of review, a defendant cannot reasonably expect an erroneous ruling on a motion to transfer to be reversed.

Moreover, the high concentration of patent cases in the most popular districts can leave defendants with meritorious motions to transfer in limbo for inordinate amounts of time. Data compiled using the patent litigation analysis tools available through Docket Navigator show that, for the eight-year period between 2008 and late 2016, not only was there a difference in the proportion of motions to change venue that were granted, there were in some instances dramatic differences in the

time to receive a ruling on a motion to transfer from one district to the next.[6]

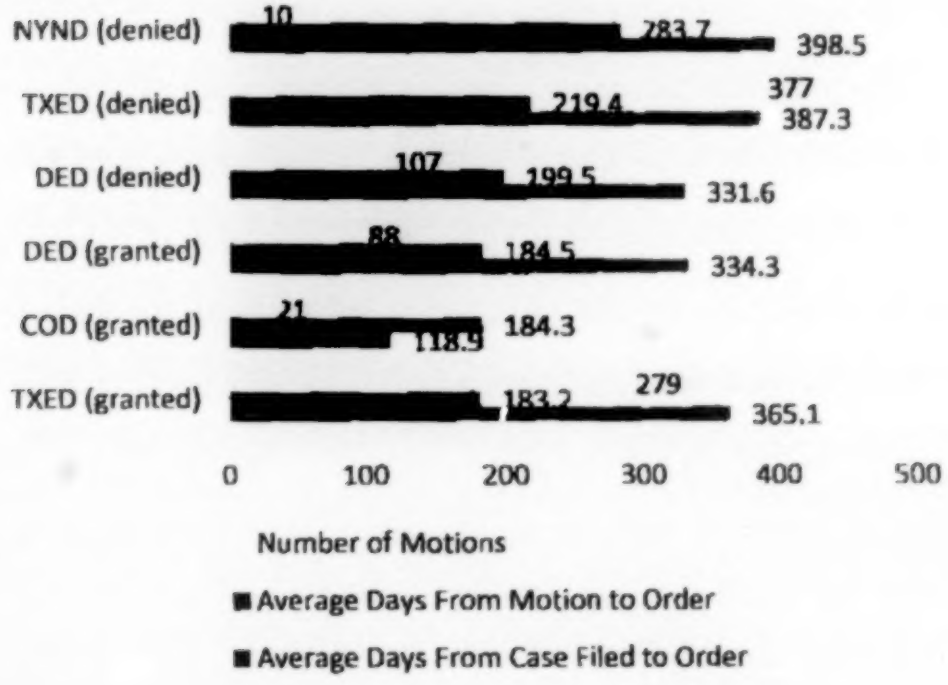

Chart 3. Longest Time to Venue Rulings.

As demonstrated in Chart 3, in some districts, even meritorious transfer motions—i.e., those that are eventually granted—waited six months, on average, for adjudication. And in those instances, the case may have been pending in the wrong district for a year or longer before it was transferred. It appears from the data that the increased patent caseloads in the busiest districts—the Eastern District of Texas and the District of

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[6] Steve Brachman, *Transferring Venue: How Long Is This Gonna Take?* Patent Infringement Blog (Jan. 17, 2017), http://docketreport.blogspot.com/2017/01/transferring-venue-how-long-is-this.html (last visited February 2, 2017).

Delaware—may have led to significant delays in ruling on motions to transfer. But other courts—the District of Colorado and the Northern District of New York—that do not even rank among the eight busiest patent districts on Chart 1, nevertheless are among the slowest to rule on motions to transfer. The slow pace for these districts shown in Chart 3 may inform how courts manage their cases or prioritize the motions. However, the concentration of the majority of patent cases in two of the slowest districts means that slow rulings on transfer motions become the *de facto* policy for most patent litigations nationwide.

In contrast, Chart 4 shows that other districts typically rule on motions to transfer much more promptly. The rulings are issued more quickly after the motion is filed, and they are issued earlier relative to when the case was filed.

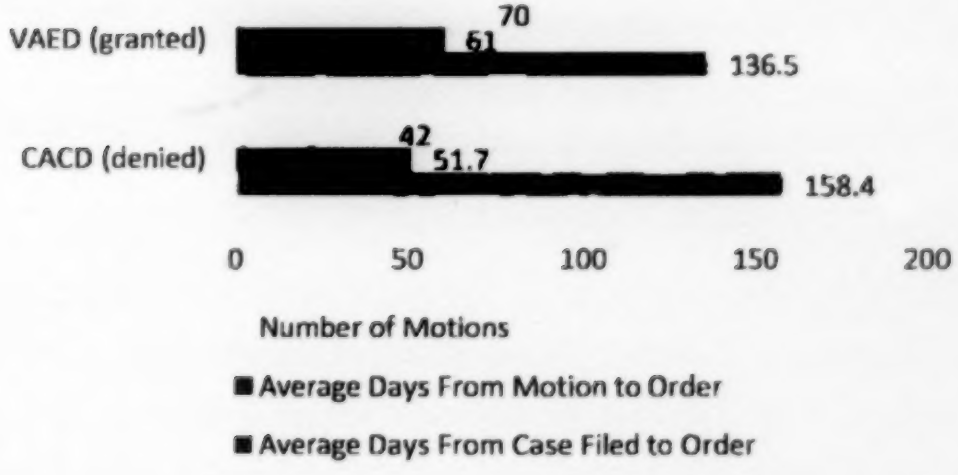

Chart 4. Shortest Time to Venue Rulings.

IV. The Federal Circuit's Interpretation of the Patent Venue Statue Negatively Impacts Parties Across Various Industries.

Some companies, especially in certain industries, are frequent targets of patent infringement suits. For a selection of companies that are frequently named as defendants in patent suits, the chart below illustrates the venues in which they have been sued over the past three years.[7] Although it is a small sampling, the chart is demonstrative of the effect of the Federal Circuit's decision in *VE Holding* on patent venue. It stands to reason that if *Fourco* is reinstated, and under Section 1400(b) corporations "reside" only where incorporated, the venues available to patent plaintiffs to sue the majority of these companies would be much more restricted. This is particularly true here because none of the companies in this sampling are incorporated in or have their principal place of business in Texas.

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[7] The values in Chart 5 are from case searches and analytics from DocketNavigator. *See* DocketNavigator Analytics, http://home.docketnavigator.com/overview/analytics/. The place of incorporation and place of business is based on public records database on LexisNexis®.

Entity	Place of Incorporat'n (State)	Principal Place of Business (State)	Number of Cases as Defendant in 2014-2016				
			ED Tex	D Del	CD Cal	ND Cal	Other
Adobe Systems	Del.	Cal.	3	2	0	3	2
ASUS	Cal.	Cal.	33	7	3	5	10
Dropbox	Del.	Cal.	8	3	0	0	1
eBay	Del.	Cal.	5	2	3	4	9
Google	Del.	Cal.	22	13	1	6	10
HP*	Del.	Cal.	39	9	7	1	14
HTC America	Wash.	Wash.	42	9	1	5	15
Macy's	Del.	Ohio	8	3	1	0	3
SAP America	Del.	Penn.	10	2	0	0	0
Xilinx	Del.	Cal.	2	4	0	0	0
* HP Inc. and related entities							

Chart 5. Frequent Corporate Defendants in Patent Cases.

Notably, the data in Chart 5 indicates, if only anecdotally, that Delaware-incorporated defendants are being sued quite frequently in venues other than the District of Delaware. If the Court reinstates the *Fourco* interpretation of Section 1400(b), it is possible that the disproportionate concentration of patent cases in Delaware could be exacerbated, or high concentrations could develop in other states where companies choose to incorporate. Under the *Fourco* interpretation, defendants can exercise at least some degree of control over the venues in which they are subject to suit by choosing where to incorporate and where to locate their businesses. If the proper interpretation of the venue statutes results in an undesirable

concentration of patent cases, any corrective changes and other policy preferences should be left to the legislature.

CONCLUSION

The Court should reverse the decision of the Court of Appeals, and remand with instructions to grant the requested writ of mandamus.

Respectfully submitted,

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